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July 14, 2006

Bob Schuetzle  
Valley Telecommunications  
102 Main Street  
Herreid, SD 57632

Bruce Mack  
11510 362<sup>nd</sup> Ave  
Leola, SD 57456

Under the authority granted by SDCL 49-7A-22, the Enforcement Committee of the South Dakota One Call Notification Board met on July 13, 2006, to determine whether there is probable cause to believe that a violation(s) had occurred relative to Complaint OC06-003 filed by Valley Telecommunications Cooperative Inc. against Bruce Mack.

By a unanimous vote of the Enforcement Committee, the recommended resolution to the alleged violations included in this complaint were determined to be as follows:

#### **Alleged Violation of SDCL 49-7A-5 Notification of Proposed Excavation**

The Committee found there was probable cause that Bruce Mack had violated SDCL 49-7A-5 by commencing excavation at T126N, R67W, Sec5, SE Quarter (2 ½ miles north of Leola on County Highway 19) without providing notification of excavation as required by SDCL 49-7A-5.

The committee recommends a penalty of five hundred dollars (\$500.00) with three hundred dollars (\$300.00) suspended on the following conditions:

1. Bruce Mack fully complies with SDCL 49-7A and ARSD Article 20:25 for twelve months following acceptance of resolution of Complaint OC06-004 by both parties.
2. Bruce Mack fully complies with the resolution of Complaint OC06-003 by making payment of the two hundred dollars (\$200) within thirty (30) days of the issuance of the Order to close Complaint OC06-003.

#### **Alleged Violation of SDCL 49-7A-12 Notification of Damage to an underground facility**

The Committee found there was not probable cause that Bruce Mack had violated SDCL 49-7A-12 by his failure to notify the South Dakota One Call Center or Valley Telecommunications of the damage to an underground facility.

The Committee recommends that the alleged violation of SDCL 49-7A-12 be dismissed.

The findings and recommendation of the Enforcement Committee are summarized on the attached form.

Under SDCL 49-7A-27 either party may accept the recommendation of the Enforcement Committee or reject the recommendation of the Enforcement Committee by requesting a formal hearing on the violation(s) alleged in this complaint. Your decision should be reflected on the third page of the attachment with the header "Acceptance or Rejection by Parties. **Please return the signed and dated form prior to the close of business on August 4, 2006 to:**

South Dakota One Call Notification Board  
1012 N. Sycamore Avenue  
Sioux Falls, SD 57110-5747

If both parties accept the recommended resolutions, the South Dakota One Call Notification Board is required to accept the resolution(s) and close this complaint. If either party rejects the Enforcement Committee resolution of the alleged violation(s), the South Dakota One Call Notification Board will conduct a hearing as a contested case under Chapter 1-26 to resolve the allegation(s) alleged in the rejected complaint. Following this hearing, the Board shall either render a decision dismissing the complaint for insufficient evidence or shall impose a penalty pursuant to SDCL 49-7A-18 or SDCL 49-7A-19.

Pursuant to SDCL 15-6-55, failure to answer this Complaint could result in a default judgment being issued against you. Appropriate liens and other legal collection actions could result. **You are strongly urged to reply to this Notice in the time frame described above and to obtain the advice of counsel should you have any legal questions.**

If you have any procedural questions relative to this complaint, please contact me at 605-339-0529 or by email at [exedir@sdonecall.com](mailto:exedir@sdonecall.com). I would request that you do not contact any members of the South Dakota One Call Notification Board to discuss this complaint. Since they may be involved in the Chapter 1-26 hearing to resolve of the complaint, they have been advised by legal counsel to not discuss any pending complaint before the Board.

Sincerely,

Larry L. Englerth  
Executive Director

# **ENFORCEMENT COMMITTEE ACTION**

## **OC06-003**

**Valley Telecommunications Cooperative, Inc. vs. Bruce Mack**

### **FINDINGS:**

#### **OC06-003**

#### **Alleged Violation of SDCL 49-7A-5 Notification of Proposed Excavation**

Allegation is made by Valley Telecommunications Cooperative, Inc. that Bruce Mack commenced excavation on April 9, 2006, at T126N, R67W, Sec5, SE Quarter (2 ½ miles north of Leola on County Highway 19) without providing prior notification to the South Dakota One Call System as required by SDCL 49-7A-5.

Bruce Mack did not dispute the allegation that excavation activity had commenced without providing advance notification to the South Dakota One Call System but did contest the allegation that notification was required for this excavation for the following reasons:

1. Notification is not required since the dirt being moved was above the natural terrain and the dirt had been previously moved by excavation activity when the dam was built 30 years previous.
2. The previously stated statutory definition of excavation was discussed with a Customer Service representative(s) at the One Call Center on April 21<sup>st</sup> and May 4<sup>th</sup> and they confirmed that he was not required to provide notification prior to excavation.
3. Notification is not required since the excavation activity was on a private road/passageway and under the statutory definition of 'excavation' an exclusion exists for "road and ditch maintenance that does not extend below eighteen inches of the original roadgrade or ditch flowline within the road right-of way..."
4. Notification is not required since Valley Telecommunications Cooperative, Inc. did not have a valid easement for the underground facility that was damaged during the excavation.

In reviewing the complaint filed by Valley Telecommunications Cooperative, Inc. and the response from Bruce Mack, the committee determined the following:

1. The definition of Excavation in the statute does not support the claim made by Bruce Mack that previously moved dirt is excluded from the notification requirement. The definition of Excavation in the statute states that "...any operation in which earth, rock, or other material in or on the ground is moved or otherwise displaced..." and there is not exemption for previously moved dirt.
2. The committee reviewed the tape of the conversation with the Customer Service Representative and did not find any relevance between this conversation and the complaint filed for the following reasons:
  - a. The conversation with the Customer Service Representatives occurred subsequent to the excavation activity noted in the complaint and therefore, would have no bearing on this issue before the Committee.
  - b. While Customer Service Representatives provide a service to the excavators and facility operators in South Dakota, they would have no standing to provide legal interpretations of the statute and it was noted that the CSR made this statement to Bruce Mack during the April 21<sup>st</sup> conversation. A person desiring legal interpretation of the statute should seek legal counsel for such interpretations.
  - c. The Enforcement Committee and the South Dakota One Call One Call Board have no obligation to accept the statutory interpretation of any party other than their legal staff.

3. The Committee reviewed the claim that the excavation involved in this allegation was exempted from notification as a result of it being part of road maintenance work. The committee could not accept this request to exclude the notification for the following reasons:
  - a. The statute requires that the road maintenance occur 'within the road right-of-way'. The response to the complaint specifically stated that this was a private road/passageway which would not have a public right-of-way associated with it. The Committee determined that the private road/passageway would be no different than other private property and would not be exempted from the notification process.
  - b. The complaint also noted that the depth of the damage was 30" and the response indicated that the damaged facility was 16" below the surface. Neither of these factors became relevant since the initial determination excluded the exemption.
4. The Committee gave no consideration to the claim that Valley Telecommunications Cooperative Inc. did not have an easement for the damaged cable. The status of a valid easement for the underground facilities on this property would have no impact on whether Bruce Mack had an obligation to provide notification of proposed excavation.

Based on the information noted above, the Committee found that there was probable cause that Bruce Mack had violated SDCL 49-7A-5 without providing advance notice to the South Dakota One Call System.

## **RECOMMENDATION**

### **VIOLATION OF SOUTH DAKOTA SDCL 49-7A-5:**

The Committee found there was probable cause that Bruce Mack had violated SDCL 49-7A-5 by commencing excavation at T126N, R67W, Sec5, SE Quarter (2 ½ miles north of Leola on County Highway 19) without providing advance notification to the South Dakota One Call System as required by statute.

### **PROPOSED PENALTY FOR THIS VIOLATION AUTHORIZED UNDER SDCL 49-7A-18:**

The committee recommends a penalty of five hundred dollars (\$500) with three hundred dollars (\$300) suspended on the following conditions:

3. Bruce Mack fully complies with SDCL 49-7A and ARSD Article 20:25 for twelve months following acceptance of resolution of Complaint OC06-003 by both parties.
4. Bruce Mack fully complies with the resolution of Complaint OC06-003 by making payment of the two hundred dollars (\$200) within thirty (30) days of the issuance of the Order to close Complaint OC06-003.

### **OC06-003**

#### **Alleged Violation of SDCL 49-7A-12 Notification of Damage to an underground facility**

Allegation is made by Valley Telecommunications Cooperative, Inc. that Bruce Mack damaged an underground facility while excavating on April 9, 2006, at T126N, R67W, Sec5, SE Quarter (2 ½ miles north of Leola on County Highway 19) and did not immediately provide notification to Valley Telecommunications Cooperative Inc. or the South Dakota One Call Center as required by SDCL 49-7A-12.

Bruce Mack did not dispute the allegation that excavation activity had resulted in damage to an underground facility but did provide a description of the actions he took to report the damage.

Based on the information provided, the Committee found that there was not probable cause that Bruce Mack had violated SDCL 49-7A-12 and recommends that the alleged violation be dismissed.

# ACCEPTANCE OR REJECTION BY PARTIES

## COMPLAINT OC06-003

THE ENFORCEMENT COMMITTEE OF THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD HAS PROPOSED A RESOLUTION TO THE VIOLATIONS ALLEGED IN COMPLAINT NUMBER OC06-003.

IF BOTH PARTIES INVOLVED IN THIS COMPLAINT ACCEPT THE COMMITTEE RESOLUTION TO EITHER OF THE VIOLATIONS ALLEGED IN COMPLAINT NUMBER OC06-003, THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD IS REQUIRED BY SDCL 49-7A-27 TO ACCEPT THIS AS FINAL RESOLUTION OF COMPLAINT OC06-003.

IF EITHER PARTY INVOLVED IN THIS COMPLAINT REJECT THE COMMITTEE RESOLUTION TO EITHER OF THE VIOLATIONS ALLEGED IN COMPLAINT NUMBER OC06-003. THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD WILL SET UP A HEARING TO RESOLVE THE REJECTED RESOLUTION TO THE VIOLATION(S) ALLEGED IN COMPLAINT NUMBER OC06-003. THIS HEARING SHALL BE CONDUCTED AS A CONTESTED CASE UNDER CHAPTER 1-26. FOLLOWING THE HEARING, THE BOARD SHALL EITHER RENDER A DECISION DISMISSING THE COMPLAINT FOR INSUFFICIENT EVIDENCE OR SHALL IMPOSE A PENALTY PURSUANT TO THE PROVISIONS OF SDCL 49-7A-18 OR SDCL 49-7A-19.

TO ACCEPT OR REJECT THE RESOLUTION OF THE ALLEGED VIOLATION, YOU SHOULD COMPLETE THE FOLLOWING AND RETURN TO THE ADDRESS BELOW PRIOR TO THE CLOSE OF BUSINESS ON AUG 4, 2006.

SOUTH DAKOTA ONE CALL NOTIFICATION BOARD  
1012 N. SYCAMORE AVENUE  
SIOUX FALLS, SD 57110-5747

PURSUANT TO SDCL 15-6-55, FAILURE TO ANSWER THIS COMPLAINT RESOLUTION COULD RESULT IN A DEFAULT JUDGEMENT BEING ISSUED AGAINST YOU. APPROPRIATE LIENS AND OTHER LEGAL COLLECTION ACTIONS COULD RESULT.

OC06-003

### VIOLATION OF SDCL 49-7A-5 NOTIFICATION OF PROPOSED EXCAVATION

I ACCEPT THE COMMITTEE RESOLUTION TO COMPLAINT OC06-003 VIOLATION OF SDCL 49-7A-5 NOTIFICATION OF PROPOSED EXCAVATION.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

I REJECT THE COMMITTEE RESOLUTION TO COMPLAINT OC06-003 VIOLATION OF SDCL 49-7A-5 NOTIFICATION OF PROPOSED EXCAVATION AND REQUEST A HEARING TO RESOLVE THE VIOLATION ALLEGED IN COMPLAINT OC06-003.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

### VIOLATION OF SDCL 49-7A-12 NOTIFICATION OF DAMAGE TO AN UNDERGROUND FACILITY

I ACCEPT THE COMMITTEE RESOLUTION TO COMPLAINT OC06-003 VIOLATION OF 49-7A-12 NOTIFICATION OF DAMAGE TO AN UNDERGROUND FACILITY

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

I REJECT THE COMMITTEE RESOLUTION TO COMPLAINT OC06-003 VIOLATION OF SDCL 49-7A-12 NOTIFICATION OF DAMAGE TO AN UNDERGROUND FACILITY AND REQUEST A HEARING TO RESOLVE THE VIOLATION ALLEGED IN COMPLAINT OC06-003.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date